88-358

Supreme Court, U.S.
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NO. A88-64

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

NORRIS THOMPSON, Petitioner,

V

UNITED STATES POSTAL SERVICE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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August 25, 1988

QUESTIONS PRESENTED

1. Does the "harmful-error" rule contained at 5 U.S.C. §7701(c)(2)(A), which places the burden on a federal employee to demonstrate to the Merit Systems Protection Board "harmful error in the application of agency procedures in arriving at...[the adverse] decision," in order that the employing agency's decision not be sustained, apply to the agency's denial to petitioner of his statutory right to receive thirty days advance written notice of an adverse action as provided by 5 U.S.C. §7513(b)(1)?

2. Does 5 U.S.C. §7703, providing that the Court of Appeals for the Federal Circuit shall hold unlawful and set aside any federal employing agency personnel action found to be (1) arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law or

(2) obtained without procedures required by law, rule, or regulation having been followed, require reversal of an agency personnel action, otherwise subject to 5 U.S.C. §7513, in which the adversely affected employee was not provided with at least thirty days advance written notice of the proposed action as provided by 5 U.S.C. §7513(b)(1)?

LISTING OF PARTIES

The parties to the proceedings below were the petitioner Norris Thompson and the respondent United States Postal Service.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

NO. A88-64

NORRIS THOMPSON, Petitioner,

V

UNITED STATES POSTAL SERVICE, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Norris Thompson, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in the above-entitled case on April 27, 1988, which

affirmed an opinion of the Merit Systems Protection Board and its Administrative Law Judge.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is unreported and is printed at *infra*, page 1a. The Journal Entry of Judgment of the United States Court of Appeals for the Federal Circuit is printed *infra*, at page 33a. The opinion of the Merit Systems Protection Board and its Administrative Law Judge is unreported and is reprinted *infra*, at page 3a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit (*infra*, page 33a) was entered on April 27, 1988 on petitioner's appeal under 5 U.S.C. §7703, of a

decision of the Merit Systems Protection Board. *Infra*, page 10a. On July 25, 1988, this court entered an order enlarging the time for the filing of this petition to August 25, 1988. *Infra*, page 34a. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. 5 U.S.C. §7513. Cause and Procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to -- (1) at least 30 days advance written notice, unless there is reasonable cause to believe the employee has

committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practical date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefore, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

2. 5 U.S.C.§7514. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

3. 5 U.S.C. §7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is ap-

pealable to the Board under any law, rule, or regulation. An appellant shall have the right -- (1) to a hearing for which a transcript will be kept; and (2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after

opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision -- (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or (B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment -- (A) shows harmful error in the application of the agency's procedures in arriving at such decision; (B) shows that the decision was based on any

prohibited personnel practice described in section 2302(b) of this title [5 USCS §2302(b)]; or (C) shows that the decision was not in accordance with law.

(d)(1) In any case in which -- (A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and (B) the Direction of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

The Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Noth-

ing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

STATEMENT OF CASE

Petitioner was a veteran preference eligible employee of the United States Postal Service for 12 years. On September 26, 1986, the Postal Service issued a notice of proposed removal, charging petitioner with failure to follow instructions of his supervisor. That notice was rescinded on October 3, 1986, and a new proposal for the removal of petitioner from

his employment was issued on October 4, 1986. The notice issued on October 4, 1986 specifically stated that it was proposed to remove petitioner from the Postal Service "no earlier than 30 calendar days from the date you receive this letter." This was in accordance with the right of petitioner to thirty days advance written notice of the proposed personnel action as provided by 5 U.S.C. §7513(b)(1). Thereafter, petitioner had conversations with the Sectional Center Director regarding the proposed action and by letter dated October 24, 1986, the proposal for removal of petitioner was upheld, with an effective date of October 27, 1986.

Petitioner appealed his removal to the Merit Systems Protection Board which conducted a hearing before an Administrative Law Judge and upheld his removal. In doing so, the Merit Systems Protection Board determined that

petitioner's argument that he had been denied the statutorily mandated thirty days written notice of his proposal removal, was an affirmative defense upon which petitioner bore the burden of proof. The Board, although finding that petitioner in fact received less than thirty days notice of the proposed removal action, rejected petitioner's defense based upon the lack of notice. The Board held that the agency's actions in that regard were governed by the harmful error standard of the Board, at 5 C.F.R. §1201.56(c)(3), its administrative interpretation of the statutory harmful-error standard contained at 5 U.S.C. §7701(c)(2)(A), and that petitioner had provided no evidence that the Board's procedural error had harmed him.

On September 28, 1987, the Merit Systems Protection Board denied petitioner's petition for review of the Administrative Law Judge's

decision and he pursued an appeal of the Board's action to the United States Court of Appeals for the Federal Circuit, pro se, under the standards contained at 5 U.S.C. §7703. On April 27, 1988, the Court of Appeals affirmed the decision of the Board "on the basis of the initial decision of the administrative law judge."

REASONS FOR GRANTING WRIT

The Federal Circuit has by its action in this case, and other decisions, misapplied the statutory and regulatory "harmful error" standards of 5 U.S.C. §7701(c)(2)(A), and 5 C.F.R. §1201.56(c)(3), so as to deny to petitioner and to all federal employees their statutory right to receive thirty days advance written notice of adverse personnel actions. In so doing, the court has thwarted a clear congressional man-

date and created a doctrine which would allow any congressional standard relating to the "procedure" for removal of protected federal employees to be effectively eliminated by reliance upon the "harmful-error" doctrine.

When Congress enacted the Civil Service Reform Act of 1978 (Act), it provided the federal employee with limited and specific grounds for discharge - "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). In connection therewith, Congress further provided certain specific procedural rights that the federal employee was "entitled to --: (1) at least 30 days advance written notice...; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of his answer; (3) be represented by an attorney or other representative; and (4) a written decision and the

specific reasons therefore at the earliest practicable date." 5 U.S.C. §7513(b). Regarding the myriad other procedures which of necessity must be created and implemented in connection with an agency's personnel actions, Congress was silent, or authorized the Office of Personnel Management and the Merit Systems Protection Board to prescribe regulations. 5 U.S.C. §7514.

In order to deal with the effect on the disciplinary process of the non-statutory and unknown procedures which would be developed and implemented by the various agencies, Congress included in the Act a specific "harmful-error" rule which provided that on appeal of an agency action, the Merit System Protection Board may not sustain the agency's action if the employee "shows harmful error in the application of the

agency's procedures in arriving at such decision." (Emphasis added.) 5 U.S.C. §7701(c)(2)(A).

The Federal Circuit, and the Board, have rightfully adapted the "harmful-error" rule and applied it to those situations in which agencies have failed to follow their own, non-statutory procedures for handling adverse personnel actions, but they have improperly expanded the rule beyond its plain language and meaning in applying it to the specific statutory procedural rights of federal employees, as enumerated at 5 U.S.C. §7513(b).

Petitioner comes before this Court seeking review of this important issue regarding his statutory employment rights, and those of all other federal employees, because a petition to this Court is the only available means for obtaining review of the Board's misapplication of

the "harmful-error" rule, inasmuch as only the Federal Circuit has jurisdiction to hear appeals from Board decisions. 5 U.S.C. §7703.

In reforming the federal civil service in 1978, Congress not only provided for exclusive jurisdiction over specific grounds for the review of agency personnel actions by the Court of Appeals for the Federal Circuit, see, 5 U.S.C. §7703, but it also determined that any agency action shall be set aside if found to be "obtained without procedures required by law... having been followed...". 5 U.S.C. §7703(c)(2). Accordingly, petitioner or any other federal service employee denied procedural rights "required by law", in absence of application of the "harmful-error" rule to such procedures, is entitled to have that action set aside by the Federal Circuit. Petitioner seeks only to obtain the benefit of his clearly articulated statutory procedural rights, by obtaining a

reversal of the Federal Circuit's blatant disregard for the instruction of Congress that an adverse personnel action "shall be set aside" where "procedures required by law" have not been followed.

CONCLUSION

The foregoing reasons for this petition for a writ of certiorari should be granted.

Respectfully submitted,

ORIGINAL SIGNED BY
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Counsel for Petitioner

August 25, 1988

APPENDIX A

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals

for the Federal Circuit

88-3010

NORRIS THOMPSON,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

DECIDED: April 27, 1988

Before FRIEDMAN, Circuit Judge, BENNET, Senior Circuit Judge, and NEWMAN, Circuit Judge.

PER CURIAM.

The decision of the Merit Systems Protection Board (board), affirming the removal of petitioner by the United States Postal Service for failure to comply with explicit instructions of his supervisor to deliver mail, is affirmed on the basis of the initial decision of the administrative judge of the board in Docket No. DA07528710073, which became final on September 28, 1987, when the board by order denied petitioner's petition for review of that decision.

Independent review of the opinion, order, and exhibits in the case convinces the court that substantial evidence supports the charge, that there was no harmful procedural error, that the penalty for the offense was authorized and reasonable, and that petitioner's discharge was for the efficiency of the service.

88-3010

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NORRIS THOMPSON, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	)	DOCKET NUMBER DA07528710073 DATE: September 28, 1988

Norris Thompson, Fort Worth, Texas, pro se.

Vanessa A. Miree, Memphis, Tennessee, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on February 3, 1987, because it does not meet the criteria for review

set forth at 5 C.F.R. §1201.115.* This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

Discrimination Claims

You may petition to the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims.

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* Appellant's reply to the agency's responses to his petition for review was filed beyond the deadlines set forth in the Board's order dated March 16, 1987, and does not meet the requirements of C.F.R. §1201.114. Therefore, it has not been considered.

and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. §7702(b)(1). The address of the EEOC is Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. The law is unsettled regarding the time limit for filing a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. §7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an appropriate United States District Court. 5 U.S.C. §7703(b)(2).

The law is unsettled regarding the time limit for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. §7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. §2000e5(f); 29 U.S.C. §794a.

Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Ap-

peals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. §7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by your or your representative, whichever occurs first. 5 U.S.C. §7703(b)(1).

FOR THE BOARD: /S/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Norris Thompson, Jr.
6304 Forest Hill Drive
Fort Worth, TX 76119

Robert A. Parmelee
Roy D. Brantley
Chappell, Handy, P.C.
910 Houston Street,
Suite 700
Fort Worth, Texas 76102

By regular mail to:

Vanessa A. Miree
Appeals Review Coordinator
U.S. Postal Service
Headquarters,
Southern Region
Memphis, TN 38166-0998

Merit Systems
Protection Board
Dallas Regional Office
1100 Commerce Street,
Room 6F20
Dallas, Texas 75242-9979

Office of Personnel
Management
Attn: Appellate Policies
Branch
1900 E Street, N.W.
Room 7635
Washington, D.C. 20415

By hand to:

Office of the
Special Counsel
Merit Systems
Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

September 28, 1987
(Date)

/S/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

NORRIS THOMPSON, Appellant,	)	DOCKET NUMBER DA07528710073
v.	)	
UNITED STATES POSTAL SERVICE, Agency.	)	DATE: February 13, 1987

Robert A. Parmelee, Esquire, Chappell & Handy, P.C., Fort Worth, TX, for the appellant.

Willie R. Hargis, for the agency.

BEFORE

Gail M. Dickenson, Administrative Judge

DECISION

Appellant timely appealed the action of the United States Postal Service removing him from his position as city carrier, effective October 27, 1986. The Board has jurisdiction over this appeal. 5 U.S.C. §§7511-7513.

In accordance with the analysis and findings made below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Preponderant evidence supports the charge that appellant failed to follow the instructions of his supervisor.

The agency removed appellant on the charge that he failed, on September 12, 1986, to follow the instructions of his supervisor to deliver the mail. The agency's action will be sustained only if it is supported by a preponderance of the evidence. 1

---

1. Preponderance of the evidence in that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 51 Fed. Reg. 25,146, 25,154 (July 10, 1986) (to be codified at 5 C.F.R. §1201.56(a)(2)). (On July 10, 1986, the Board republished its rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part).

Appellant's supervisor, Verlinda McCarty, testified that on September 12, 1986, appellant turned in a request for auxiliary assistance on his route. McCarty testified that no assistance was available and that she told appellant to take the mail with him. She later observed the mail on a separate cart and again told appellant to take the mail with him. On a third occasion that morning, McCarty observed that appellant had moved the mail by the door and had it placed in two hampers. McCarty testified that on the afternoon of September 12 she observed appellant after he returned from the route. She saw mail sitting in the hamper that he had brought back and asked appellant why he had brought the mail back. She testified that appellant said he had to go and that he left. The mail remaining was the mail for which appellant had requested auxiliary assistance on the morning of September 12.

Doris Bailey, a management trainee, testified that she was observing McCarty on the morning of September 12 as part of her training for a management position. Bailey testified that on two occasions she heart McCarty instruct appellant that he was to take the mail with him. The first time she heard McCarty tell appellant that he would have to take the mail with him because there was no one available for assistance. A second time she heart McCarty call out to appellant and tell him again that he was to take the mail with him. Bailey testified that when a carrier is instructed to take the mail that means to deliver the mail. If a carrier needs overtime to deliver the mail, he may use it; however, he is not to bring the mail back without specific instructions.

Jack Gillis, manager of the station, testified that he had told appellant not to bring mail back on at least six previous occasions. He stated that the employees are not to bring mail back unless specifically authorized to do so. Harriet Crane, another employee at the station, testified that the carriers are not to bring mail back unless instructed to do so by the supervisor.

Appellant testified to a different version of the events on September 12, 1986. He testified that he requested auxiliary assistance from McCarty on that morning and that she told him to go ahead and separate out the mail to leave for auxiliary assistance. He stated that he left the auxiliary assistance form at her desk later that morning and was told at that time that there had been a change; that he was to take the mail with him; and that he would get two hours of auxiliary assistance on the

street. This meant that a carrier would join him on his route to help him complete the route. Appellant testified that no auxiliary assistance came to his route and that he therefore returned with the mail. He stated that McCarty asked him what had happened and that he stated he did not find the auxiliary help and therefore came back to the station. He denied at any time telling McCarty that he had to leave and asserted that he could have taken the mail out and delivered it if McCarty had told him to do so.

Appellant testified that it was his understanding that if auxiliary help was given he could not use overtime. Since he thought he was getting two hours of auxiliary help, he did not believe that he was authorized to use overtime. Accordingly, he brought the mail back to the station. Appellant testified that he had received disciplinary action for using overtime

and had been specifically told by Gillis that he was not to work overtime without calling the station and letting Gillis know about the situation. Appellant also testified that several carriers had brought mail back. As evidence of this, he cited several requests for auxiliary assistance, written by him, which reflect that he was claiming a need for auxiliary assistance based in part on the fact that prior assistance had failed to deliver certain articles. See Appellant's Exhibits 4-9. Appellant's exhibits are carbons of forms submitted to the postal service. In his testimony, appellant first stated that the notations about the carriers returning articles were not placed on the original forms; on further questioning, he stated that those remarks were made on the originals of the forms.

Contrary to appellant's assertion that carriers regularly brought back mail, all other employees who testified stated that it was extremely rare for a carrier to return with mail. McCarty could recall only one example: a part-time flexible clerk who had brought back mail when specifically instructed to do so so that he could keep an appointment. Bailey could recall no carrier who had brought back mail. Gillis recalled two examples: the part-time flexible employee who had to be downtown for a meeting and was told to bring back the mail and a part-time employee who brought back mail during his probationary period and was fired. Crane, who was called as a witness by appellant, testified that carriers may bring back the mail only if instructed to do so by the supervisor. She could recall no instances of carriers bringing back mail. Crane testified that if she were at the end of

her shift and still had mail, it was her understanding that she should call the station and ask the supervisor what to do.

Appellant urges that there are discrepancies in the accounts given by McCarty and Bailey. He noted that McCarty stated that one conversation took place on the way to the break room; an event that was not recalled by Bailey. He further noted that McCarthy reported a response by him that he was not on the overtime desired list and that Bailey did not recall appellant making such a reply. Finally, appellant pointed to the fact that the official postal service form reflected that overtime had been approved and yet his form, a carbon copy, did not reflect such overtime approval.

In light of the consistent testimony that employees are not to bring mail back to the station, I do not find appellant's unofficial forms persuasive that employees regularly

brought mail back. Further, the difference between appellant's carbon of his September 12 request for assistance and the agency's copy of the form are not persuasive on the issue of appellant's being granted auxiliary assistance and denied overtime. The form kept by appellant does not reflect that auxiliary assistance was granted.

I find persuasive the testimony of McCarty, corroborated by the testimony of Bailey, that appellant was told to take the mail with him. I further find persuasive the testimony of McCarty, corroborated by both Bailey and Crane, that the instruction to take the mail means to deliver the mail and not to return to the station with the mail.

Appellant asserted that he had been disciplined for working overtime on days when he had been given auxiliary assistance and that on September 12 he therefore was afraid of working

overtime for fear of disciplinary action. However, appellant had not received any auxiliary assistance on September 12, even under his version of what occurred, and therefore he would not be in a position to fear disciplinary action for working overtime. Further, even assuming that appellant believed that auxiliary assistance was going to be furnished to him at some point during his route, he failed to explain why, when such assistance did not appear, he returned to the station rather than calling the station and inquiring. It is not plausible that appellant, who asserted that someone was supposed to meet him on his route to give auxiliary assistance, would, upon not finding that person, simply pack up the mail and return to the station. If appellant truly believed he was given auxiliary assistance, his actions would leave the carrier providing such

assistance scouring the streets of appellant's route looking for him while he returned to the station.

Based on the credible evidence of record, I find that appellant was instructed by his supervisor on September 12 to take the mail with him. I further find that such an instruction encompassed both taking the mail and delivering it. In disobedience of such instruction, appellant returned to the station with mail. Accordingly, I sustain the charge.

Appellant failed to prove his affirmative defenses of harmful error or discrimination.

Notwithstanding my decision on the merits of the action being appealed, the agency's action may not be sustained appellant shows harmful error by the agency in arriving at the decision or shows that the decision was based on a prohibited personnel practice described in 5 U.S.C. §2302. 5 U.S.C. §7701(c)(2). Appel-

lant has the burden of proof as to such affirmative defenses. 5 C.F.R. §1201.56(b)(1). Appellant asserted that the agency erred procedural in that it gave him less than thirty days notice of the removal action. He further contended that the action was taken on the basis of discrimination based on race and reprisal for filing discrimination complaints.

The record reflects that appellant was issued a notice of proposed removal on September 26, 1986, charging him with failure to follow the instructions of his supervisor. That notice was rescinded on October 3, 1986, and a new proposal issued on October 4, 1986. By decision letter dated October 24, 1986, the removal action was upheld, with an effective date of October 27, 1986. Appellant therefore received less than thirty days notice of the proposed action.

The Board has held that an agency's failure to follow the statutory requirement of thirty days notice is to be governed by the harmful error standard. *See Ladd v. U.S. Postal service*, 25 M.S.P.R. 506 (1984) *(citing Baracco v. Department of Transportation*, 15 M.S.P.R. 112 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir. 1984)).

Under the harmful procedural error standard of the Board, an appellant must not only show that the agency erred but also that the error was harmful. See 5 C.F.R. §1201.56(c)(3) (1986). The rescinded notice of proposed removal of September 26 was based on the same events set forth in the final proposal of October 4, 1986. Appellant made oral replies to both proposals. Appellant provided no evidence as to how the error by the agency harmed him.

Accordingly, based on the evidence of record, I find that appellant has failed to show harmful procedural error by the agency.

In his petition of appeal, appellant alleged that he had been discriminated against on the basis of race and in reprisal for filing discrimination complaints. Appellant produced no evidence in support of these allegations. Allegations, standing alone, are insufficient to support a claim of discrimination or reprisal. *See Simmons v. Social Security Administration*, 10 M.S.P.R. 295 (1982).

The penalty proposed was within the bounds of managerial discretion.

An agency's action may only be taken for such cause as will promote the efficiency of the service. The Board has held in *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 (1981), that is has the authority to review the penalty imposed only to determine whether the

penalty is clearly excessive for the sustained charge, or is otherwise arbitrary, capricious, or unreasonable.

The record reflects that appellant had approximately twelve years of service with the agency. The agency contended that notwithstanding his length of service, appellant's action required removal from his position. The agency pointed to the seriousness of failure to follow instructions and appellant's past disciplinary record. The disciplinary record reflects that on July 10, 1985, the agency proposed to suspend appellant for seven days for failure to perform his duties in a satisfactory manner. That proposal was reduced to a letter of warning by use of the grievance procedure. On December 10, 1985, appellant was given a seven-day suspension for failure to follow the instructions of his supervisor. That suspension was taken to arbitration and an

arbitrator denied the grievance. On April 17, 1986, appellant was suspended for fourteen days for failure to perform the duties his position and failure to follow the instructions of his supervisor.

Appellant argued that the fourteen-day suspension should not be considered in his past disciplinary record because it was the subject of a pending grievance. An agency may rely on a record of past discipline even where it is the subject of a pending grievance. *See Freeman v. Department of Transportation, Federal Aviation Administration*, 20 M.S.P.R. 290, 292, (1984). A review of that proposed action does not reflect that it is clearly erroneous. Accordingly, it will be considered. Appellant further argued that the usual progression of discipline in the postal service included a thirty-day suspension prior to removal. Appellant cited no authority such a

progression was mandatory. Finally, appellant argued that even if the charge was sustained, the penalty should be mitigated because of his prior disciplinary actions. He asserted that he had been disciplined for using overtime and using auxiliary assistance and that his confusion and apprehension resulted in his actions in the instant case.

An agency has a right to expect employees to obey the orders of their supervisors. While appellant may have been concerned about the possibility of overtime, that concern could certainly have been manifested in a more productive manner than by returning to the station with mail in disobedience of a supervisor's instructions. Based on the evidence presented, I find that the agency has met the standard of review set forth in *Douglas v. Veterans Administration* in that the agency

has shown that the penalty imposed is not outside the tolerable limits of reasonableness. Accordingly, the penalty is AFFIRMED.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on March 10, 1987, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§1201.113, .117. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Ave., N.W.
Washington, D.C. 20419

in accordance with the Board's regulations. 5 C.F.R. §1201.114. The parties are required to serve any petition for review and any subsequent pleading on all other parties. 5 C.F.R.

§ 1201.114(h). The petition for review must be filed on or before March 10, 1987, and must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

If appellant wishes to contest the Board's final decision on the issue(s) of discrimination raised, administrative review of those issues alone may be obtained by filing a petition for review with the Equal Employment Opportunity Commission (EEOC) within thirty days of the date the initial decision becomes final. 5 U.S.C. §7702(b)(1). The address for EEOC is:

Office for Review and Appeals
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20507

If appellant wishes to contest the Board's final decision on the issue(s) of discrimination and has not filed a petition with EEOC, judicial review of all issues may be obtained

by filing a petition with an appropriate United States District Court within thirty days of the date the initial decision becomes final. 5 U.S.C. §7702(a)(3)(A). In court cases involving issues of discrimination which were brought before the Board under 5 U.S.C. §7702, appellants have the right to request the court to appoint an attorney to represent them. 42 U.S.C. §2000e-5(f)(2).

If appellant chooses not to contest the Board's final decision on the discrimination issue(s), (s)he may, if the court has jurisdiction, obtain judicial review of the other issues by filing a petition with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition must be received by the court within thirty days of the date the initial decision becomes final. 5 U.S.C. §7703(b)(1).

FOR THE BOARD:

/S/
Gail M. Dickenson
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of th
foregoing DECISION was sent by regular mai
this date to:

Mr. Robert A. Parmelee/Roy D. Brantley
CHAPPELL & HANDY, P.C.
910 Houston Street, Suite 700
Fort Worth, Texas 76102

Mr. Norris Thompson, Jr.
6304 Forest Hill Drive
Fort Worth, Texas 76119

Mr. Willie R. Hargis
U.S. Postal Service
4600 Mark IV Parkway
Fort Worth, Texas 76161-9994

Office of Personnel Management
ATTN: Appellate Policies Branch
1900 E STreet, N.W., Room 7635
Washington, D.C. 20415

February 3, 1987

/S/
Deborah Gersh
Legal Clerk

United States Court of Appeals for the
Federal Circuit

88-3010

NORRIS THOMPSON,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DA07528710073

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

DATED April 27, 1988

/S/
Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: May 18, 1988

SUPREME COURT OF THE UNITED STATES

No. A88-64

Norris Thompson,
Applicant
v.
United States Postal Service

O R D E R

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS HERE ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

August 25, 1988.

s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 25th day of July, 1988.